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Supreme Court, U.S.
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NO. 04-448

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN A. HORN, Secretary, Pennsylvania DOC;
GEORGE R. WHITE, Superintendent, SCI-PITTSBURG, and
JOSEPH P. MAZURKIEWICZ, Superintendent, SCI-ROCKVIEW,

Petitioners,

v.

DONALD HARDCASTLE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court grant certiorari review of a *non-final order* in a capital habeas corpus case when the only ostensible exigency supporting interlocutory review relates to a discovery dispute, which is pending before the Court of Appeals?

(Not Answered below)

2. Was the Pennsylvania Supreme Court's decision denying relief under Batson v. Kentucky, an unreasonable application and/or contrary to that decision, when it found a *prima facie* case of discrimination in jury selection; the prosecution failed to offer any reasons – much less race neutral ones – for the strikes of two of the stricken African American jurors; and the Pennsylvania Supreme Court identified no such reasons.

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit)

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COUNTERSTATEMENT OF THE CASE[1]

Respondent, Donald Hardcastle, is a prisoner who was sentenced to death in the state courts of the Commonwealth of Pennsylvania. After unsuccessfully litigating a claim under Batson v. Kentucky, 476 U.S. 79 (1986), on direct appeal and in state post-conviction proceedings, Mr. Hardcastle filed a *Petition for a Writ of Habeas Corpus* in the United States District Court for the Eastern District of Pennsylvania. Hardcastle v. Horn, No. 98-CV-3028 (E.D. Pa. 1998) (Hon. John R. Padova, J.). The Petition presented his Batson claim and other claims for relief. Following submission of briefs and related pleadings, and two days of oral argument, the District Court found that the trial prosecutor engaged in intentional discrimination in the selection of Mr. Hardcastle's jury; that the Pennsylvania Supreme Court's resolution of this claim was contrary to, and an unreasonable application of, Batson; and granted the writ. Hardcastle v. Horn, 2001 WL 722781 (E.D. Pa. June 21, 2001) (hereinafter "DCO").

Current Petitioners, the Commonwealth of Pennsylvania (represented by the office of the Philadelphia County District Attorney), appealed to the United States Court of Appeals for the Third Circuit. A unanimous panel of that Court agreed with the District Court's finding that the Pennsylvania Supreme Court's decision denying the Batson claim was an unreasonable application of and contrary to Batson. However, two members of the panel believed that the District Court erred in not acceding to the prosecutor's request to conduct an evidentiary hearing in the District Court to permit the prosecutor an opportunity to provide race-neutral reasons for her strikes of African American venirepersons, if she could. Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004). Therefore,

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[1] The Petition for Writ of Certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." All emphasis herein is supplied unless otherwise indicated.

the matter was remanded to the District Court for purposes of permitting the Commonwealth to provide proof that the trial prosecutor had race neutral reasons for the exercise of her strikes against minority venirepersons. The sole dissenter believed, as did the District Court, that a hearing was not appropriate or required inasmuch as the prosecutor's discriminatory intent was obvious from the record and years before she conceded that she had no recollection of the reasons for her strikes. Id. at 262 (Nygaard, J., dissenting).

On June 14, 2004 in preparation for the evidentiary hearing, Mr. Hardcastle's counsel filed *Petitioner's Discovery Motion*, seeking four forms of discovery: 1) a pre-hearing deposition of the trial prosecutor; 2) her handwritten voir dire notes from this trial; 3) her handwritten voir dire notes from 28 other trials she conducted in capital-eligible homicide cases over the course of her career; and 4) training materials relevant to voir dire used by the Philadelphia District Attorney's office. As explained in the *Motion* these materials were relevant to Steps 2 and 3 of the Batson three-step inquiry. See note 3, below.

On August 3, 2004, the Commonwealth filed its *Response to Motion for Discovery*. It agreed to provide the trial prosecutor's handwritten notes from this trial; claimed that the training materials would be "difficult to find"; and opposed the remaining requests.

On August 17, 2004 the District Court granted Petitioner's *Discovery Motion* and ordered that Petitioner be provided with essentially all of the requested items, and on August 18, 2004 the District Court scheduled the evidentiary hearing for November 18, 2004.

On August 27, 2004 the Commonwealth filed a *Notice of Appeal* to the United States Court of Appeals for the Third Circuit; and a separate *Petition for a Writ of Mandamus*, each challenging

the District Court's discovery order.[2]

In response to these filings, on September 9, 2004 the District Court **vacated the discovery order** and replaced it with an order requiring only that the Commonwealth provide the trial prosecutor's notes from Mr. Hardcastle's trial, and deferred ruling on the remainder of the discovery request.

The Third Circuit has yet to dispose of the Commonwealth's *Notice of Appeal* or *Petition for a Writ of Mandamus*.

REASONS FOR DENYING THE PETITION FOR CERTIORARI REVIEW

I. THE JUDGMENT FOR WHICH THE COMMONWEALTH SEEKS CERTIORARI REVIEW IS NOT FINAL. ITS REASONS FOR SEEKING INTERLOCUTORY CERTIORARI REVIEW RELATE TO AN UNRESOLVED DISCOVERY DISPUTE THAT IS NEITHER WORTHY OF, NOR RIPE FOR, THIS COURT'S REVIEW.

Although this Court may exercise its certiorari review over non-final judgments of a Court of Appeals, "except in *extraordinary cases* the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 252, 258 (1916):

> [T]his Court should not issue a writ of certiorari to review a decree of the circuit court of appeals of an appeal from interlocutory order, unless it is necessary to prevent *extraordinary inconvenience and embarrassment in the conduct of the cause.*

American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 384 (1893).

The Commonwealth seeks to justify its request for interlocutory certiorari review because of the "immediate harm" it alleges that has been, or will be, caused by the District Court's discovery order. (*Petition* at 2.) Yet, there is nothing "extraordinary" about this situation. The Commonwealth's complaints about the discovery ordered by the District Court – which in any event

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[2] These actions were docketed in the Court of Appeals as Hardcastle v. Horn, No. 04-CV-9018 (3d Cir.) and In re: Martin Horn, No. 04-CV-9017 (3d Cir.), respectively.

was vacated and is nonetheless being appealed to the Court of Appeals – are grossly exaggerated. The discovery dispute about which the Commonwealth complains is hardly momentous. The District Court initially granted a deposition and required that the Commonwealth locate the trial prosecutor's voir dire notes from 28 prior homicide cases as well as any training materials related to voir dire. Such a discovery order would barely merit this Court's intervention, even if presented as part of a final judgment. But, the Commonwealth's request for certiorari review comes to this Court motivated by an unresolved discovery dispute (the discovery order complained of was **vacated by the District Court**, and in any event, the dispute is currently before the Court of Appeals, which has yet to rule on the *Mandamus Petition* or set a briefing schedule regarding the *Notice of Appeal*), and as part of litigation that is not yet final (Mr. Hardcastle's *Petition for a Writ of Habeas Corpus* has not been finally litigated).[3]

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[3] Mr. Hardcastle believes that the District Court's initial discovery order was proper, and he intends to defend it before the Court of Appeals. As an initial matter, there can be little doubt that Mr. Hardcastle has "good cause" for his request because the "specific allegations before the court show reason to believe that [he] may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief" on his Batson claim. Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)). This Court has made clear that "evidence relating to a pattern and practice of race discrimination in the *voir dire* by the [local] District Attorney's Office," including office evidence of discriminatory office policies to which the trial prosecutor may have been exposed, is relevant in assessing the credibility of the prosecution's race-neutral explanations for its strikes of black jurors. Miller -El v. Cockrell, 537 U.S. 322, 347 (2003); id. at 334-35 ("Of more importance [then anecdotal testimony of bias provided by former prosecutors], the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service"; the Court cites a training manual as evidence of that policy). This is precisely the type of discovery that Mr. Hardcastle has sought and that the District Court initially granted.

Moreover, the specific *types* of information Mr. Hardcastle has sought have long been recognized as relevant in proving discrimination. For instance, the trial prosecutor has admitted keeping track of the race of jurors in this and several other capital cases, and the Philadelphia District Attorney's office has neither denied that jury selection notes exist from her other capital prosecutions nor that she also kept track of the race of jurors in those cases. The simple fact that

Therefore, this case is obviously far from final. Mr. Hardcastle is still incarcerated on Pennsylvania's death row, awaiting the evidentiary hearing that was initially scheduled for November 18, 2004, but which has been postponed pending this Court's resolution of this *Petition*, and the discovery dispute currently in the Court of Appeals.

This case presents neither a final decree nor a set of extraordinary circumstances that would merit this Court's interlocutory intervention. The Writ should be denied for this reason alone.

II. The District Court and Court of Appeals Correctly Decided that the Pennsylvania Supreme Court's Disposition of Mr. Hardcastle's Jury Discrimination Claim Unreasonably Applied and/or Was Contrary to Batson v. Kentucky, 476 U.S. 79 (1986).

There are many reasons why the District Court and Court of Appeals correctly held that the Pennsylvania Supreme Court's determination of Mr. Hardcastle's claim that the Philadelphia District Attorney's office discriminatorily struck African-American jurors in this case was contrary to and/or an unreasonable application of clearly established constitutional law set forth by this Court in Batson v. Kentucky, 476 U.S. 79 (1986).

First, the record clearly establishes that Mr. Hardcastle has proven a *prima facie* case under Batson; the prosecution has presented no race-neutral reasons for its strikes; the trial prosecutor has long ago conceded that she cannot provide reasons for her strikes; and the apparent reasons invented

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Ms. Rubino habitually kept track of the race of the venire is itself evidence of discriminatory intent. Miller -El, 537 U.S. at 347 ("The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards."). Further, it provides substantive evidence of the race of jurors in the cases Mr. Hardcastle has used to develop statistically significant evidence of the prosecutor's career-long pattern and practice of discriminatorily striking black jurors. This historical pattern and practice of racial bias in jury selection is highly relevant to this Court's Step Three analysis under Batson and would certainly provide relevant evidence that whatever explanations the prosecution ultimately propounds for her striking 86% of all black jurors, but leaving a token black juror to serve in this case, were pretextual and lack credibility.

by the Pennsylvania Supreme Court after the fact are clearly pretextual. If this alone does not entitle Mr. Hardcastle to a new trial (as the District Court initially held), it at the very least requires an evidentiary hearing (as the Court of Appeals held). Second, as both the District and Circuit Courts agreed, the process by which the Pennsylvania Supreme Court denied relief on this claim was riddled with procedural and substantive defects.

After accepting that Mr. Hardcastle had satisfied his Step One obligation under Batson's three-step analysis[4] (i.e., he presented a *prima facie* case), the state court improperly relieved the Commonwealth of its Step Two burden of producing the prosecutor's own clear and specific race-neutral explanations for her strikes and failed to conduct *any* Step Three inquiry whatsoever.[5]

At Step Two, the state court exempted the prosecution from its obligation to articulate the prosecutor's "clear and reasonably specific" race-neutral explanations, Batson, 476 U.S. at 98 n.20, for striking more than 85% of the available African-Americans and the only Latino in the venire. Instead, it conducted its own *post hoc* review of the voir dire transcripts and invented its own apparent reasons that a hypothetical prosecutor could possibly have employed to justify these strikes.[6] Because the *post hoc* ostensibly race-neutral explanations invented by the Pennsylvania

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[4] See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003).

[5] The Pennsylvania Supreme Court itself acknowledged that Mr. Hardcastle presented a *prima facie* case of discrimination. See Commonwealth v. Hardcastle, 549 Pa. 450, 465, 701 A.2d 541, 548 (1997). This was not a difficult finding. The prosecutor used 12 of her 14 peremptory strikes against African American venirepersons and the jury that convicted Mr. Hardcastle consisted of 11 whites and 1 African American.

[6] The record is clear that in more than two decades of litigation, the Philadelphia District Attorney's Office has never presented to any court the trial prosecutor's actual reasons – race-neutral or otherwise – for peremptorily striking 86 percent of all the black jurors that she had an opportunity to accept or strike in this case. On the contrary, the trial prosecutor admitted on the record *twenty-one years ago* that she struck 12 of 14 jurors she believed were black, that she

Supreme Court were not the trial prosecutor's actual reasons and, therefore, did not reflect the prosecutor's state of mind when she made the challenged strikes, the District Court held that the state court's decision was contrary to, or an unreasonable application of, Batson. DCO at *10-*11.[7]

As a matter of law, the state court's *post hoc* invention of hypothetical reasons that might conceivably have supported the exercise of peremptory challenges does not constitute a state court "factfinding" of clear and specific reasons that actually motivated the prosecution's peremptory exclusion of 85.71% of eligible black jurors. But even if the state court's substitution of its own unarticulated "apparent" reasons for reasons actually articulated by the prosecution could be considered "factfinding," the Pennsylvania Supreme Court nevertheless failed to provide any explanation for the strikes of two jurors the Court knew were black.

Even after relieving the prosecution of its burden of producing the prosecutor's reasons for her strikes, the state court was unable to invent any "identifiable reasonable basis for a [peremptory] challenge" for the strikes of at least two African-American jurors. Commonwealth v. Hardcastle, 519 Pa. 236, 243-44, 546 A.2d 1101, 1104 (1988). As a result, the state court resorted to justifying

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could not provide any explanations for those strikes, and that it was already impossible to reconstruct the record to provide reasons for her strikes.

Even when the Pennsylvania Supreme Court improperly denied relief or an evidentiary hearing on this claim on direct appeal, that court never set forth any race-neutral reasons that purported to be the actual reasons the prosecutor struck any of the jurors in this case. Instead, the state court engaged in a *post hoc* review of the record to ascertain any hypothetically race-neutral reasons that could have justified a peremptory challenge against black jurors. Even then, the state court was unable to invent any race-neutral reasons for striking two of the black jurors. With respect to these black jurors, the state court simply asserted that these strikes were justified because the prosecution had the opportunity during voir dire to observe the demeanor of those jurors.

[7] The Third Circuit found it unnecessary to address this portion of the state court's decision because it found other aspects of the decision to have unreasonably applied Batson.

these strikes on the grounds that "the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge." Id. at 244, 546 A.2d at 1104. Both the District Court and the Third Circuit found this unreasonable under Batson – and it is manifestly so. This is because this ground was made up by the Pennsylvania Supreme Court. There was simply no evidence, allegation, or proffer made by the Commonwealth at any stage of the proceedings that this was the reason for any of the strikes.

Batson overturned two critical elements of the "crippling burden of proof," 476 U.S. at 92, that Swain v. Alabama,[8] had erected against proof of an equal protection violation for racially discriminatory exercise of peremptory challenges. The first of these elements was the requirement that the defendant establish an extrinsic history of systemic discrimination as a precondition to proving a *prima facie* case of discrimination in the defendant's case. The second core element of Swain that Batson rejected was the presumption that the trial prosecutor "properly exercised the State's [peremptory] challenges." 476 U.S. at 91 (citing Swain, 380 U.S. at 221-22). Batson made clear that "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Id. at 96. The Pennsylvania Supreme Court's justification of a challenged strike based solely upon the prosecutor's "opportunity to observe" a prospective juror is not only an unreasonable application of Batson but an evisceration of this presumption.

Finally, once it *sua sponte* invented possible reasons a hypothetical prosecutor might strike some (but not all) of the black jurors in this case, the state court ended its inquiry altogether with no Step Three consideration of the credibility or pretextual nature of these justifications. Thus, the

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[8] 380 U.S. 202 (1965).

Third Circuit correctly determined that –

> even assuming *arguendo* that it was appropriate in this case for the Pennsylvania Supreme Court to sift through the trial record in an effort to identify unstated race-neutral bases for challenged peremptory strikes, the court failed to either (1) identify a satisfactory step two explanation for the striking of Venirepersons 11 and 12, or (2) conduct an adequate step three analysis as to any of the African-Americans struck from the venire. Thus, even accepting the Pennsylvania Supreme Court's proffered justifications as facially valid, we are still unable to conclude that its resolution of the matter is an objectively reasonable application of *Batson*.

368 F.3d 246, 257 n.4.

The District Court went on to conduct a thorough Step Three analysis describing the pretextual nature of the state court's invented justifications and granting relief without need for a evidentiary hearing two decades after the prosecutor indicated she could not recall why she struck any juror. The Third Circuit remanded for an evidentiary determination at Steps Two and Three.

CONCLUSION

Petitioners seek interlocutory review of a routine Batson decision. The decision is not final, as an evidentiary hearing still must be held. The discovery dispute that is apparently agitating the prosecution is itself neither onerous, nor final. Unless Mr. Hardcastle is to be granted a new trial on the state of the present record, there must be an evidentiary hearing at which the prosecution attempts to meet its Step Two burden under Batson. And if the prosecution is permitted to present "race-neutral" reasons twenty years after the trial prosecutor represented that she could not provide any, Mr. Hardcastle is entitled under Step Three to fully rebut the prosecution's presentation and demonstrate why these reasons are pretextual.

This case is far from worthy of this Court's review at this time. Certiorari should be denied.

Respectfully Submitted,

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Certificate of Service

I, Robert Brett Dunham, hereby certify that on this 16th day of November, 2004 I served a copy of the foregoing *Brief in Opposition to Petition for Writ of Certiorari* upon the following person by United States Mail, first class, postage prepaid:

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